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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DOUGLAS FULLER, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B228815 (Los Angeles County Super. Ct. No. BC370032)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael C. Solner, Judge. Affirmed.

Haney, Roderick, Torbett & Arnold and Steven H. Haney for Plaintiff and Appellant.

McCune & Harber, Christy L. O'Donnell and Heather M. Bean for Defendants and Respondents.

Douglas Fuller, a former firefighter trainee with the Los Angeles County Fire Department, appeals the judgment entered after the trial court granted summary judgment in favor of the County of Los Angeles and County employees Dave Saran and Pitt Gilmore (collectively the County defendants) on Fuller's claims of employment discrimination, harassment, retaliation and related torts. Fuller contends the trial court erred in concluding the claim he filed with the Department of Fair Employment and Housing (DFEH) failed to identify any protected status or activity and thus did not satisfy the exhaustion requirements of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). He also contends the court erred in concluding his non-FEHA tort claims against the County defendants are time-barred. Because Fuller did not properly exhaust his administrative remedies with respect to his FEHA claims and his tort claims, while timely, are without merit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Fuller's Employment with the County Fire Department*

In 2005, when Fuller was 37 years old, he was accepted as a trainee with the County Fire Department and assigned to the 118th Fire Academy. According to the allegations in the operative first amended complaint, on August 5, 2005, Jason Armenta, a 35-year-old fellow firefighter trainee, poured water in Fuller's firefighter boot as a prank. Although Fuller immediately emptied the boot, it remained damp. During the course of a training session later that day involving a fire, the water remaining in Fuller's boot boiled, causing burns and blisters on his foot.

On August 8, 2005 Fuller reported his injuries and Armenta's prank, a violation of internal County Fire Department rules, to his supervisor, Captain Leckliter, who imposed disciplinary consequences on both Fuller and Armenta. (Armenta had claimed he performed the prank after Fuller had made fun of him for slowing down the class.) According to Fuller, after he reported the incident, his instructors, including Gilmore, began to harass him and find fault with his training exercises. One instructor told him

"[o]ld guys have no motivation." During Fuller's termination interview, Gilmore told him he did not like veterans.[1]

2. *Fuller's Termination from the County Fire Department*

On August 16, 2005, during a hose lay exercise, points were deducted from Fuller's score for various mistakes. Fuller insists he either did not make the mistakes or other trainees did not receive point deductions for similar errors. On August 18, 2005 the County terminated Fuller's employment for failing to accumulate enough points in the training program. On August 30, 2005 Fuller appealed the termination decision to the County's employee relations department, which investigated and upheld the decision on December 16, 2005. Fuller did not file any other internal grievance or any administrative complaint relating to the August 2005 incidents.

3. *Fuller's Employment with the Riverside County Sheriff's Department*

In February 2006 Fuller began work as a deputy sheriff trainee with the Riverside County Sheriff's Department at its 168th Training Academy. However, in April 2006 Fuller received an invitation from the County Fire Department to attend a background orientation regarding possible employment as a firefighter trainee. Still eager to be a firefighter, on May 5, 2006 Fuller called in sick to the Riverside County Sheriff's Department and attended the orientation. On his application for employment with the County Fire Department, Fuller wrote, "Do Not Contact" my employer. Captain David Saran, the Fire Department's background investigator, assured Fuller it was the policy of the County Fire Department not to contact a prospective trainee's employer unless the trainee was going to be accepted into the academy. In a subsequent telephone conversation with Saran, Fuller reiterated he did not want his employer contacted unless he was going to be accepted into the training program.

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1 Fuller is a veteran of the United States Air Force.

4. *Fuller's Termination from the Riverside County Sheriff's Department*

On June 5, 2006 Fuller's temporary employment with the Riverside County Sheriff's Department was terminated without explanation. In August 2006 Fuller discovered Saran had called the Riverside County Sheriff's Department in May 2006 and revealed Fuller's attendance at the background orientation meeting on the same day he had told his supervisors at the Sheriff's Department he was too sick to report for work.[2]

5. *Fuller's DFEH Complaint*

On August 4, 2006 Fuller filed a DFEH complaint alleging he had been harassed by County Fire Department personnel on August 5, 2005 and terminated on August 18, 2005 because of his "reference, background check, and personal dislike by some trainees." On the form where the complaining party was directed to identify the form of discrimination he or she had suffered (race, sex, age, religion, national origin), Fuller marked "other" and wrote "poor reference." Fuller did not mention his age as a factor in the harassment, identify the personnel who had allegedly harassed him or include any other information on the administrative charge.

On August 24, 2006 the DFEH issued its "right-to-sue" letter, advising Fuller of its decision to close the case and his right to pursue a civil action under FEHA within one year.

6. *Fuller's Notice of Ineligibility for the County Fire Department's Trainee Program*

On October 5, 2006 Fuller received a letter from the County Fire Department informing him it had investigated his background as part of the application process and determined he was not eligible for employment as a firefighter trainee. Citing County Fire Department background guidelines and Civil Service rule 6.04, section F, the County

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[2] Fuller appealed the termination and requested a hearing. He was informed by the Riverside County Sheriff's Department that, as a probationary employee, he could be terminated with or without cause and thus had no right to a review hearing. Fuller does not challenge the Riverside County Sheriff's Department's decision to terminate him.

explained his disqualification was based on the fact he had been terminated by the County Fire Department as well as by "another fire agency."[3]

7. *Fuller's Pursuit of Internal Grievance Procedures Challenging the October 5, 2006 Eligibility Decision*

On October 13, 2006 Fuller appealed the decision through the County's internal grievance department, asserting he should not have been deemed ineligible for employment with the County Fire Department. Fuller insisted his prior termination was improper and in retaliation for reporting a rules violation. He also wanted to clarify he had been terminated by the Riverside County Sheriff's Department, not another fire agency.

On November 16, 2006, the department denied the appeal on its merits, concluding Fuller had been terminated from its training program due to poor performance in the hose lay exercises and not due to any retaliatory conduct. It also determined he had been terminated by the Riverside County Sheriff's Department for not being honest and truthful during his employment with them. Under County Civil Service Rules, either termination was sufficient by itself to disqualify Fuller from employment with the County Fire Department.

8. *Fuller's Government Claim with the County Board of Supervisors*

On February 7, 2007 Fuller filed a claim with the County Board of Supervisors pursuant to Government Code section 911.2, subdivision (a). In a detailed, 10-page claim letter Fuller highlighted the alleged misconduct of the County Fire Department and its instructors following his report of Armenta's actions in August 2005. Fuller advised the County he was pursuing claims against it for retaliation, negligent and intentional

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3 The letter stated, "This action is based on Fire Department Background Guidelines and Civil Service Rule 6.04, Section F, which state[s] that the Director of Personnel may withhold or remove the name of a person on the eligible list [¶] . . . '[w]ho has been dismissed or has resigned in lieu of discharge from any position, public or private, for any cause which would be a cause for dismissal from county service, or whose record of employment has not been satisfactory in the county service, or with any other agency or firm.'"

infliction of emotional distress, negligent and intentional interference with his employment with the Riverside County Sheriff's Department and harassment.

On March 17, 2007 the Board of Supervisors denied the claims on the merits, informing Fuller its investigation of the matter "fail[ed] to indicate any liability on the part of the County of Los Angeles."

9. *Fuller's Lawsuit*

On April 25, 2007 Fuller filed a lawsuit in the Los Angeles County Superior Court asserting claims for (1) violation of his federal civil rights (42 U.S.C. § 1983) (against County only); (2) interference with prospective economic advantage (against County and Saran); (3) retaliatory conduct in violation of Los Angeles County Code section 5.02.060 and Labor Code section 1102.5 (against County, Saran and Gilmore); and intentional infliction of emotional distress (against County, Saran and Gilmore).

On May 30, 2007 the defendants removed the complaint to federal district court. Fuller then amended his complaint to add an additional federal civil rights claim and claims for age discrimination, harassment and retaliation under FEHA.

On January 29, 2009 the federal court dismissed Fuller's two federal civil rights claims and remanded the remaining causes of action to the Los Angeles County Superior Court.

10. *The County Defendants' Motion for Summary Judgment/Summary Adjudication*

On January 8, 2010[4] the County defendants moved for summary judgment, or, in the alternative, summary adjudication. They argued the non-FEHA causes of action were barred because Fuller had failed to file an administrative claim as to any of them within six months of the date the causes of action accrued. As to the FEHA claims, the County defendants argued they exceeded the scope of the DFEH complaint and thus were barred under FEHA's exhaustion doctrine. Pitt and Gilmore also argued, as employees and agents of the County acting in the course and scope of their employment, they could not

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4 The lawsuit was stayed from November 2008 to October 2009 while Fuller was on active duty in Iraq.

be held liable for any of the alleged misconduct as a matter of law. The County defendants also argued there was no evidence to support any of the claims.

11. *Fuller's Opposition to the County Defendants' Summary Judgment/Summary Adjudication Motion*

In his papers in opposition to the motion, Fuller did not address the County defendants' argument directed to the deficiencies in his DFEH complaint. Rather, he argued his FEHA claim for age discrimination and harassment was valid even though he was under 40 years old because he had been perceived by his supervisors as being over 40 years old. As for his non-FEHA claims, Fuller argued they were timely because the filing requirements of the government claims statute were tolled while he pursued his internal administrative remedies. He also argued there were triable issues of material fact as to each claim that could not be decided on summary judgment.

12. *The Trial Court's Order Granting the Motion*

The trial court granted summary judgment for the County defendants. The court concluded the non-FEHA causes of action were time-barred under Government Code section 911.2. The court also ruled the claims in the FEHA cause of action exceeded the scope of the DFEH complaint and were barred under the exhaustion doctrine.[5]

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We view the evidence in the

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5 On November 7, 2010 Fuller filed a notice of appeal from the trial court's September 13, 2010 minute order granting the County defendant's motion for summary judgment. The court entered its judgment on May 12, 2011. We treat Fuller's premature notice of appeal as timely. (See Cal. Rules of Court, rule 8.104(d)(2).)

light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *Fuller's FEHA Claims Were Properly Dismissed for Failure To Exhaust Administrative Remedies*

FEHA prohibits an employer from, among other things, using age to discriminate against an employee in connection with hiring, firing or promotions. (Gov. Code, § 12940, subd. (a).) Although "age" within the meaning of FEHA refers to the "chronological age of any individual who has reached his or her 40th birthday" (Gov. Code, § 12926, subd. (b)), FEHA also makes actionable discrimination or harassment based on an employee's age if the employer believes the employee is 40 years old or older, even if the employee is actually younger than 40 years of age. (See Gov. Code, § 12926, subd. (n) [FEHA's protections encompass those who are perceived as having any characteristics protected under the statute].)[6] FEHA also prohibits harassment based on age and other classifications expressly protected by FEHA (Gov. Code, § 12940, subd. (a)) as well as retaliation for engaging in FEHA-protected activities. (Gov. Code, § 12940, subds. (a), (h).)

Exhaustion of FEHA administrative remedies is a prerequisite to judicial relief. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83 (*Rojo*); *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1612 (*Okoli*) ["'[u]nder California law "an employee must exhaust the . . . administrative remedy" provided by the [FEHA] by filing an administrative complaint with the DFEH'"]; see *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1086 [while an employee need not pursue both internal remedies and administrative remedies, proper filing of [DFEH] complaint is prerequisite to recovery under FEHA].)

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6 At the time of Fuller's lawsuit, Government Code section 12926's prohibition against discrimination based on perceived protected characteristics was stated in subdivision (m). Effective January 2012, Government Code section 12926 was amended and subdivision (m) was redesignated as subdivision (n). (Stats. 2011, ch. 719, § 14.5.)

The purpose of the exhaustion requirement is to provide the DFEH with the opportunity to resolve the dispute and eliminate "unlawful employment practices by conciliation." (*Rojo, supra*, 52 Cal.3d at p. 83; accord, *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 156.) Thus, the administrative complaint must set forth sufficient information to identify the person or employer alleged to have committed the unlawful practice as well as "the particulars" of the unlawful practice. (Gov. Code, § 12960, subd. (b); *Wills*, at pp. 157-158.) If not, the exhaustion requirement has not been satisfied. (See *Wills*, at pp. 157-158 [DFEH charge defines scope of lawsuit and must include facts alleging some basis for FEHA claim; otherwise FEHA claim has not been properly exhausted].)

Fuller's August 4, 2006 DFEH charge, in which he alleged he had been harassed, retaliated against and terminated because of "reference, background check and personal dislike by some trainers," falls far short of meeting the exhaustion requirement for any of his FEHA claims, even applying the most liberal construction to that charge. (See generally *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 267 ["'Administrative charges are to be construed liberally because they are often drafted by claimants without the assistance of counsel. Accordingly, "[i]t is sufficient that the EEOC be apprised, in general terms, of the alleged discriminatory parties and the alleged discriminatory acts"'"].) Fuller expressly indicated his complaint was based on "poor reference" rather than age-based discrimination or harassment; in fact, Fuller's age is never mentioned in the DFEH charge, nor can it be said to be reasonably related to the facts actually alleged. As a result of this deficiency, Fuller has failed to exhaust his administrative remedies on those claims. (See *Wills v. Superior Court, supra,* 195 Cal.App.4th at pp. 157-158 [merely checking box on DFEH form without mentioning unlawful acts in DFEH complaint is insufficient to exhaust administrative remedies]; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1725 [plaintiff foreclosed under exhaustion doctrine from pursuing claims for gender discrimination, harassment and retaliation when the only claim she filed with DFEH was for age discrimination]; *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1123

[plaintiff could not pursue FEHA claim for age harassment because DFEH complaint only included allegations of gender discrimination].)

Similarly, although Fuller alleged in his DFEH complaint that he was the victim of retaliation, he did not identify any conduct that was actually protected by FEHA as the basis for the alleged retaliation. (See Gov. Code, §§ 12940, 12960, subd. (b).) Harassment or termination based on "personal dislike" by instructors is not a proper ground for a FEHA cause of action.

Fuller's reliance on *Martin v. Fisher* (1992) 11 Cal.App.4th 118 and *Saavedra v. Orange County Consolidated Transportation* (1992) 11 Cal.App.4th 824 is misplaced. In both cases the courts held a party identified in the body of the DFEH charge may be sued even if omitted from the DFEH complaint's caption because the body of the complaint was sufficient to put the appropriate party on notice of an alleged FEHA violation. (See *Martin,* at pp. 121-122; *Saavedra,* at p. 824.) The deficiencies in Fuller's DFEH charge are significantly greater than a failure to include appropriate identifying information in the caption of the DFEH charge. Here, no FEHA-protected status or activity was alleged in any part of the administrative charge.

To satisfy the exhaustion requirement and salvage his FEHA claims, Fuller urges us to consider the letter of complaint he filed with the County's Office of Affirmative Action (OAA) the same day he filed his DFEH charge.[7] THE OAA, however, is not the DFEH; and the OAA filing cannot substitute for a proper DFEH complaint or make up for its deficiencies. (See generally *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1515 [rejecting plaintiff's argument a letter he wrote to DFEH identifying the persons who engaged in unlawful acts under FEHA was sufficient to substitute for a deficient DFEH charge; FEHA "does not authorize any alternative to the requirement of the filing of a 'verified complaint in writing'" with DFEH]; *Wills v. Superior Court, supra,* 195 Cal.App.4th at p. 158 [oral notice of to DFEH is insufficient

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[7] The OAA is a county department created to implement and enforce the County's Equal Employment Opportunity Non-Discrimination Policy. (See http://www.countypolicy.co.la.ca.us/9010M.pdf Aug. 2, 1994.)

to substitute for deficient DFEH charge]; but see *Nazir v. United Airlines, Inc., supra,* 178 Cal.App.4th at pp. 268-269 [court considered letters written to DFEH detailing factual bases for claims in the DFEH charge in concluding those claims had been properly exhausted].) Moreover, even if properly considered, the letter of complaint filed with the OAA fails to identify any protected FEHA status or conduct. Although the OAA filing identifies in exceptional detail the incidents of harassment Fuller alleges he endured after reporting Armenta's rules violation, it is entirely devoid of any allegation the harassment was based on Fuller's age or perceived age or that he was retaliated against for engaging in any FEHA-protected activity.

2. *Fuller's Tort Causes of Action, Although Timely, Are Without Merit*

a. *Because the County did not deny Fuller's administrative claims on timeliness grounds, it has forfeited that defense*

The Government Claims Act (Gov. Code, § 900 et seq.) requires, with limited exceptions not relevant here, "all claims for money or damages against local public entities" to first be presented to the local public entity before a lawsuit against the entity may be maintained. (See Gov. Code, § 946.4 [no suit may be brought against public agency "unless and until a claim is presented to the agency"]; *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 ["'failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity'"]; *State of California v. Superior Court* (*Bodde*) 32 Cal.4th 1234, 1239 [same].) The purpose of the claims statute "'is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 705.)

When the claim relates to a cause of action for personal injury, it must be presented to the public entity "'not later than six months after the accrual of the cause of action.'" (Gov. Code, § 911.2, subd. (a).) If the injured party fails to submit a claim within the requisite time period, a written application may be made to the public entity for leave to present a late claim. (Gov. Code, § 911.4, subd. (a).) If the application is

denied, the aggrieved party may petition the superior court for relief from the claim requirements. (Gov. Code, § 945.6, subds. (a)(1)-(3), (b).)

If a claim is filed after the six months have expired, and without the application for late filing required by Government Code section 911.4, the public entity may, within 45 days after the claim is presented, give written notice to the person presenting the claim that it was not timely filed and is being returned without further action. (Gov. Code, § 911.3, subd. (a).) The notice shall advise the party that his or her only recourse is "to apply without delay" to the public entity "for leave to present a late claim." (*Ibid.*) If the public entity fails to give the party presenting the claim the requisite notice that the claim was untimely and alert the party of his or her options under Government Code section 911.4, the entity forfeits any timeliness defense under the Government Claims Act. (Gov. Code, § 911.3, subd. (b) ["[a]ny defense as to the time limit for presenting a claim described in subdivision (a) [of Gov. Code, § 911.3] is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented"]; see *Phillips v. Desert Hospital Dist., supra,* 49 Cal.3d at p. 706 ["[t]his possibility of waiver encourages public entities to investigate claims promptly, and to make and notify claimants of their determinations, thus enabling the claimants to perfect their claims"]; *Dixon v. City of Turlock* (1990) 219 Cal.App.3d 907, 911 ["The purpose of the section 911.3 notice is to assure that the claimant distinguishes between a claim rejected on its merits and one returned as untimely. Thus the claimant is informed as to which procedure to pursue."].)

The County argued in its summary judgment motion, and the trial court agreed, that each of Fuller's claims was barred by Government Code section 945.6, subdivision (a)(1), because it was not presented to the County Board of Supervisors within the six-month limitation period and no application was made for a late filing. We need not determine when each cause of action accrued and whether it was timely filed under the Government Claims Act. Because the County Board of Supervisors did not deny the claims on timeless grounds or provide the notice set forth in Government Code section 911.3, subdivision (a), it has waived any right to assert the timeliness provisions

in Government Code section 945.6 as a defense. (Gov. Code, § 911.3, subd. (b).) Nonetheless, as we explain in the sections below, summary judgment was proper because each of the claims lacks merit.

b. *Fuller's cause of action for intentional interference with prospective economic advantage fails because he cannot demonstrate any wrongful conduct occurred*

To establish the tort of interference with prospective economic advantage, a plaintiff must show, among other things, the defendant engaged in an independently wrongful act beyond the act of the interference itself. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 (*Korea Supply*); accord, *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 596.)[8] "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply*, at p. 1159; accord, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.)

Fuller premises his cause of action for intentional interference with prospective economic advantage on Saran's discussions with Sergeant Tim Elwell at the Riverside County Sheriff's Department. Citing evidence that Saran had discussions with Fuller's former supervisor at the County Fire Department and knew Fuller would be declared ineligible for hire before he called Sergeant Elwell, Fuller argues there is at least a triable issue of material fact whether Saran called Elwell as part of a legitimate preemployment background check or as part of a malicious effort to disrupt his employment with the Riverside County Sheriff's Department.

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8 The elements of the cause of action for interference with prospective economic advantage are (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. (*Korea Supply Co., supra*, 29 Cal.4th at pp. 1164-1165.) It is the third element to which the requirement of an independently wrongful act is directed. (*Id.* at p. 1165.)

Regardless of the motivation for the contact, Fuller is unable to demonstrate the conduct was wrongful, that is, proscribed by some constitutional, statutory, regulatory or common law standard. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1159.) Although Fuller insists County Fire Department policy during the relevant period prohibited calling an applicant's current employer without the applicant's consent unless the applicant had been hired pending a completed background check,[9] violation of an internal policy, without more, does not provide the constitutional, statutory, regulatory or common law wrong sufficient to state a claim. (*Ibid*.) Moreover, even if the violation of an internal policy were otherwise sufficient and accepting Fuller's disputed characterization of the policy as accurate, Fuller consented to the contact: He signed an authorization permitting the County to contact his employer as part of a preemployment background check,[10] a fact Fuller ignored in his opposition papers and again in his appellate briefs. Absent evidence Saran made any misrepresentations to Elwell or otherwise exceeded the scope of Fuller's authorization, there simply is no wrongful conduct to support the interference claim.[11]

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9 Fuller and the County vigorously disputed whether such a policy existed. The County maintained Fuller's evidence, from an "anonymous source," was fabricated, lacked proper authentication and should not be considered. Ultimately the trial court struck Fuller's evidence, a ruling he challenges on appeal. In light of our holding that the conduct was not wrongful even if such a policy existed, we need not review this evidentiary ruling.

10 Fuller signed a "personal inquiry waiver" form, expressly authorizing the County Fire Department to conduct a background check related to his credit history, education, academic achievement, personal history, employment and work performance. Among other things, the authorization stated, "Consent is granted for the Los Angeles County Fire Department to furnish the information described above to third parties in the course of fulfilling its official responsibilities. I further understand that I waive any right or opportunity to read or review any information provided and the background investigation report prepared by the Los Angeles County Fire Department."

11 To the extent Fuller contends the wrongful conduct may be found in Saran's misstatements to him, either about the County Fire Department's policy or, at the very least, about Saran's own intent in following it, such purported misstatements do little to aid his claim. Although fraudulent inducement is a separate wrong that would support a claim for intentional interference with prospective economic advantage (see *Rickel v.*

c. *Fuller's causes of action for whistleblower retaliation under Labor Code section 1102.5 and Los Angeles County Code section 5.02.060 fail because they are not premised on disclosure of a violation of state or federal law or regulation*

Labor Code section 1102.5, subdivision (b), prohibits an employer from retaliating "against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information disclosed a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." The statute's purpose is to "encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77.)

Fuller contends the County Fire Department retaliated against him for reporting Armenta's violation of its safety rules. However, the disclosure of an internal policy violation, standing alone, is an inadequate basis for a claim for whistleblower retaliation under Labor Code section 1102.5. (See *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933 [to come within provisions of Lab. Code, § 1102.5, the activity disclosed by employee must violate a federal or state law, rule or regulation]; *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 (*Mueller*) [same].)

Mueller, supra, 176 Cal.App.4th 809 is directly on point. A County firefighter alleged the County had violated Labor Code section 1102.5 by retaliating against him

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Schwinn Bicycle Co. (1983) 144 Cal.App.3d 648, 659 ["wrongfulness may lie in the *method* used; for example, a defendant might usurp the prospective advantage by means of fraud, misrepresentation or duress"]), any reliance by Fuller on statements that contradicted the express terms of the consent form he had signed would be unreasonable as a matter of law. (See generally *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498-1499 [reasonable or justifiable reliance is essential element of fraud or misrepresentation claim]; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1269 [although issue whether plaintiff's reliance was reasonable is usually a question of fact, "'whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts'"]; *Ostayan v. Serrano Reconveyance Co.* (2000) 77 Cal.App.4th 1411, 1419 [affirming summary judgment on claims for intentional and negligent misrepresentation because reliance unreasonable as matter of law].)

after he filed a formal grievance challenging the department's transfer of two of his colleagues, which the firefighter claimed violated internal departmental policy. The *Mueller* court affirmed an order granting summary judgment in favor of the County, explaining that, by its terms, Labor Code section 1102.5 requires disclosure of a violation of state or federal law or regulation. Reporting violations of County Fire Department internal policies that do not amount to a violation of state or federal law or regulation cannot serve as the basis for a whistleblower retaliation claim under Labor Code section 1102.5. (*Mueller,* at p. 822.)

Fuller's related contention that the County's conduct runs afoul of Los Angeles County Code section 5.02.060, which prohibits the County from retaliating against its employees for reporting, among other things, "a work-related violation by a [C]ounty officer or employee of any law or regulation,"[12] suffers from the same fatal flaw: There is no violation of any "law or regulation." In addition, as the *Mueller* court explained, there is no private right of action under this local code provision, which contains its own remedies for violations. (*Mueller, supra*, 176 Cal.4th at p. 820; see also Los Angeles County Code, § 5.02.060, subd. C.)

Fuller alternatively argues he was the victim of retaliation—terminated and later disqualified from employment—because he reported age discrimination and harassment, a violation of FEHA and federal civil rights laws. However, the evidence is undisputed

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12 Los Angeles County Code section 5.02.060 provides, "A. No officer or employee of the county of Los Angeles shall use or threaten to use any official authority or influence to restrain or prevent any other person, acting in good faith and upon reasonable belief, from reporting or otherwise bringing to the attention of the county auditor-controller or other appropriate agency, office or department of the county of Los Angeles any information which, if true, would constitute: a work-related violation by a county officer or employee of any law or regulation; gross waste of county funds; gross abuse of authority; a specific and substantial danger to public health or safety due to an act or omission of a county official or employee; use of a county office or position or of county resources for personal gain; or a conflict of interest of a county officer or employee." Subdivision B. of that section prohibits County employees from retaliating against any employee who reports "any information regarding subjects described in subsection A of this section."

that Fuller reported a safety violation to his superiors, not age discrimination or age-based harassment.

d. *Fuller's cause of action for intentional infliction of emotional distress fails because the conduct alleged, to the extent it is not subject to workers' compensation exclusivity, is not "extreme or outrageous" as a matter of law*

Fuller's cause of action for intentional infliction of emotional distress requires, among other things, extreme and outrageous conduct by the County with the intention of causing, or reckless disregard for the probability of causing, Fuller's severe emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) A defendant's conduct is " 'outrageous' when it is so '"'extreme as to exceed all bounds of that usually tolerated in a civilized community.'"'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) '"'"[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"'" are insufficient to state a claim. (*Id.* at p. 1051.) Emotional distress is severe when it is '"'"of such substantial quality or enduring quality that no reasonably person in civilized society should be expected to endure it.'"'" (*Ibid.* [Supreme Court has set a "high bar" to establish the severity of the emotional distress suffered]; see *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 215 [same].)

In their summary judgment motion the County defendants argued this cause of action was preempted by the exclusivity provisions of the Workers' Compensation Act (Lab. Code, § 3200 et seq.). To the extent Fuller's emotional distress claim is based on his allegations of "unfair discipline," the County defendants are correct: Those actions fall within the normal part of the employment relationship, even when they are intentional and maliciously harmful. (See *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160 ["[w]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotion, criticism of work practices and frictions in negotiations as to grievances, an employee suffering from emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly

unfair, outrageous, harassment or intended to cause emotional disturbances resulting in disability"]; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15 [discipline and criticism are a normal part of the employment relationship; "[e]ven if such conduct may be characterized as intentional, unfair, or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions"].)

However, workers' compensation exclusivity rules do not apply to age-based harassment claims, which, like sexual harassment, fall outside the ordinary course of employment. (See *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1164 ["harassment consists of conduct outside the scope of necessary job performance"]; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1100 [same], overruled on another ground in *Green v. Ralee Engineering Co., supra,* 19 Cal.4th at p. 80, fn. 6.) Such harassment may be considered sufficiently "extreme and outrageous" to state a cause of action for intentional infliction of emotional distress. (Cf. *Hughes v. Pair, supra,* 46 Cal.4th at pp. 1050-1051 [if properly alleged, a claim for sexual harassment can establish "'the outrageous behavior element of a cause of action for intentional infliction of emotional distress'"]; *Kelley v. The Conco Companies, supra,* 196 Cal.App.4th at p. 216 [same]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 618 [same].).

Nonetheless, Fuller's allegations and supporting evidence fall far short of describing extreme and outrageous conduct sufficient to go to a jury. Fuller identifies two or three isolated remarks he attributes to his perceived age.[13] None of them, however, considered separately or together, is so extreme or outrageous as to be outside the bounds of human decency, much less create a hostile work environment permeated by age-based harassment. (See *Hughes v. Pair, supra,* 46 Cal.4th at p. 1049 [defendant

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13 Fuller cited evidence that an instructor had used the phrase "old broken down tools" to refer collectively to his class of recruits who were older (in their 40's and 50's) than typical trainees in other classes although Fuller admitted he did not recall the context or whether the comment was specifically directed at him. Fuller also cited evidence that an instructor had said he did not like "veterans" and one instructor told Fuller while Fuller was doing push-up exercises, "Old guys have no motivation."

trustee's remark to decedent's wife, "I'll get you on your knees eventually" and "fuck you one way or another," a vulgar reference to financial destruction, amounted neither to quid pro quo sexual harassment nor hostile work environment under Civ. Code, § 51.9 because conduct, in context, was not sufficiently severe or pervasive; single remark was also insufficient to support cause of action for intentional infliction of emotional distress]; *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 369 [allegations of sexual harassment that fell "far short" of establishing hostile work environment also failed to establish extreme or outrageous conduct to support claim of intentional infliction of emotional distress]; see generally *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 [tort of intentional infliction of emotional distress does not "extend to 'mere insults, indignities, *threats*, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind.'"].)

Fuller also argues the termination of his employment, as well as the subsequent refusal to rehire him, caused him to suffer severe emotional distress. He asserts both decisions were based on his "poor performance," which he insists was pretext for age discrimination. Such personnel decisions, however, even if improperly motivated, cannot form the basis for an intentional infliction of emotional distress claim. "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.) Thus, personnel actions by an employer such as hiring and firing are insufficient to support a claim of intentional infliction of emotional distress even when those decisions are motivated by discriminatory conduct. (*Ibid.*) In such cases, where the conduct is outside the scope of workers' compensation exclusivity, the proper remedy is a suit for discrimination. (*Ibid.* ["A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for

discrimination"]; see also *Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883-884.)[14]

DISPOSITION

The judgment is affirmed. The County, Pitt and Gilmore are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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14 In light of our holding the non-FEHA causes of action are without merit, we need not consider Saran's alternative argument he cannot be held liable as a matter of law to the extent any of the causes of action against him are based on managerial decisions made on his employer's behalf during the course and scope of his employment.